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NO. 1050

In the Supreme Court of the United States

OCTOBER TERM, 1941

B. W. COYLE, C. G. LONG, MARY ST. CLAIR, SEWELL & SEWELL, a Copartnership Composed of L. N. Sewell and ——— Sewell, ALBERT ZEPP, CHAS. W. LENOU, R. E. HOBBS, PERRY C. BURKS, CRAWFORD M. JAMES, W. S. JAMES, T. M. JAMES, HELEN JAMES DUNLAP and VASSIE JAMES HILL ET AL.,

Petitioners,

VERSUS

W. B. SKIRVIN, Individually and as President, O. W. SKIRVIN, Individually and as Vice-president, M. A. LUTY, Individually and as Secretary-Treasurer and ELLSWORTH JORDAN and F. C. WALLOWER, Individually and as Members of the Board of Directors, Respectively, of American Oil and Refining Company, an Oklahoma Corporation, MRS. PEARL R. MESTA, MRS. GEORGE TYSON, Formerly Mrs. M. S. Adams, TEXAHOMA REALTY COMPANY, SKIRVIN OPERATING COMPANY, SKIRVIN HOTEL, Incorporated, and BROADWAY DEVELOPMENT COMPANY, Oklahoma Corporations,

Respondents.

REPLY BRIEF OF PETITIONERS

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April, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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Respondents Adopt Theory of Circuit Court of Appeals and Not That of Trial Court

These petitioners in their original brief called attention to the conflict between the opinion of the trial court and that of the Circuit Court of Appeals.

The former, in sustaining the motions to dismiss the

complaint, did so on the ground that these petitioners as stockholders of the Oklahoma Corporation had no right to institute this suit "since the right, at the time, to insitute said suit was vested solely in the receiver of the court in Case Number 2050" (Receiver of Nevada Corporation) (R. 233).

The Circuit Court, on appeal, did not adopt this theory. On the contrary, it recognized the regularity of these proceedings as originally brought and the regularity of the appointment of E. F. Lester as receiver of the Oklahoma Corporation, but held that this suit has abated since that time in some way.

Due to this confusion, petitioners, in their original brief set forth certain principles of law in propositions I to VIII, inclusive (pp. 20-29), not only sustaining their right to bring this action but showing that they invoked the only remedy available to them to secure redress for the wrongful acts of their fiduciaries.

Respondents, in their answer brief, admit the correctness of these eight propositions of law. They thereby place themselves squarely behind the conclusion of the Circuit Court rather than that of the trial court.

This conclusion of the Circuit Court, thus adopted by the respondents is, that, although this suit was regularly instituted and a receiver regularly appointed, it has since abated by reason of the failure of petitioners to have the receiver, E. F. Lester, substituted as plaintiff or to get formal permission of the court to prosecute the suit in their own names.

Petitioners, on pages 12 and 13 of their petition cite numerous decisions from other circuits and from Oklahoma holding that the appointment of a receiver in a case does not abate the principal suit and that it is not necessary to substitute the receiver as a party plaintiff. On page 38 of their brief, additional cases are cited sustaining this rule. On pages 39 and 40, a large number of additional cases are cited where the question was not raised but indicating that it is the general practice for minority stockholders' suits to continue in the names of the original plaintiffs, after the appointment of a receiver in the case. These petitioners there stated, "in fact, we believe that is the universal practice." If there are any cases to the contrary, undoubtedly respondents would have found them. Evidently they could find none for they do not cite any authorities where the practice is different.

On pages 12 and 13 of their answer brief, they do cite a full page of authorities. Many others could have been added to these, to the same effect. These cited cases recite the well-recognized rule, that, *after a receiver has been appointed,* stockholders may not *begin* a derivative suit without first making a demand upon the receiver to do so.

These cited cases are not in conflict with the cases cited by these petitioners. None of them hold that the subsequent appointment of a receiver abates the principal suit *already pending* or that substitution of the receiver as party plaintiff is necessary. This conclusion of law of the Circuit Court, upon which it based its judgment, is therefore not supported by any authority and, if approved, con-

stitutes a complete reversal of the universal practice in stockholders' suits. Such a reversal should not be made except upon sound fundamental reasons. The only reason advanced by respondents is contained on pages 11 and 12 of their brief, where they say that if the case is prosecuted by the stockholders, a judgment rendered in the case would not be binding on the corporation or its representatives and that another suit might follow in the same matter. The authorities generally hold that, in the absence of fraud or collusion, a judgment in a class action is binding on all for whom the suit was brought even though they have not participated in the proceedings. This identical question was raised in the case of *Hartford Accident & Ind. Co.* v. *Federal Bond & Mortgage Co.*, 59 Fed. 950, 956, cited on page 12 of our petition, which is perhaps the latest commitment on this question. There, this contention was held not good.

But even if it were not binding, defendants in the suit could protect themselves by moving that the receiver be made a party, or the court, on its own motion, might so order under the new Rules of Civil Procedure (Rule 21, F. R. C. P.). Under the numerous authorities, cited by these petitioners however, this is not jurisdictional but discretionary with the court and substitution may be made at any time, even after judgment.

But, although there is no authority to support the conclusion of the Circuit Court, let us concede, for the purpose of argument, that the receiver should be substituted. Even in such case, was the failure to substitute the receiver such a fatal infirmity as to justify the opinion af-

firming the dismissal of the complaint? Would it not have been more consistent with the new rules of civil procedure, and especially with Rule 21, liberalizing the method of adding parties, for the Circuit Court to have reversed the trial court and directed that a successor receiver be appointed and substituted as plaintiff? One of the prime purposes of these new rules is to prevent the miscarriage of justice and the loss of valuable rights of a litigant, because of some useless technicality, especially where the defect may be remedied without injury to the parties to the suit. Should not the Circuit Court have taken notice of the fact, that, at the time of the dismissal of the complaint, the receiver had long since deceased and that the court had refused to appoint a successor and that at that time there was no receiver to substitute? Furthermore, if the trial court had arrived at the same conclusion of law as later adopted by the Circuit Court and had held that the suit was regular and the receivership regular and that the only defect in the proceedings was the failure to substitute the receiver, these petitioners, in deference to such opinion, could have complied therewith by amendment or motion. Most certainly these petitioners would have had no objection to such a substitution had their attention been called to this theory. Petitioners now say, since their point has been raised, in accord with the same kind of suggestion made by counsel and acted upon by the court on appeal in the Hartford Accident & Ind. case, last cited, that they have no objection to the substitution of the receiver in the further prosecution of this suit if desired by respondents.

Attention is called to the fact that respondents do not now contend in their answer brief that this case has been abated because of the pendency of another suit involving the same subject-matter.

This is a suit by minority stockholders in behalf of all of the stockholders of the dissolved Oklahoma Corporation, charging their fiduciaries, officers and majority stockholders, with numerous frauds of the most flagrant nature by which they have enriched themselves in immense sums at the expense of the Oklahoma Corporation and its stockholders. They demand an accounting and that a lien or equitable trust be impressed upon most valuable property belonging to the defendants in which petitioners claim the fruits of these fraudulent acts have been invested. They then pray distribution of the amounts collected in final liquidation. This is the principal suit. As an aid thereto, they asked for a receivership which was granted. The respondents are seeking to avoid making answer to these serious charges brought by real parties in interest who are the ones injured by these breaches of trust.

The only other suit pending is Case No. 2050. That is an action brought by a creditor of the Nevada Corporation seeking to subject assets to the debts of the Nevada Corporation. It is not a suit to enforce restitution against the officers and majority stockholders. They are not defendants in that suit. The issues in the two suits are not common and respondents do not now make any such contention.

In fact, respondents in their response and answer brief,

definitely limit their contentions to *one* proposition of law as being the only one involved. On pages 2 and 3 of their response under the heading, "PROPOSITION OF LAW INVOLVED," they define this issue. This proposition is the one already discussed in this brief, namely that this suit has abated because petitioners have not caused the receiver herein to be substituted or secured permission of the court to prosecute this case in their own names. Respondents have elected to stand or fall upon the correctness or incorrectness of this one proposition.

The attempt of the respondents to limit this discussion to the single issue of law mentioned in their response, has a tendency to divert attention from their own activities in attempting to walk out of this suit with the *res* and place the control of the affairs of the Oklahoma Corporation back in themselves without the knowledge or consent of the court in this case. In view of this fact, petitioners again call attention to, and emphasize the baneful effects of, such activities if sanctioned by the courts, as set forth and discussed in their first and second assignments of error in their petition and supporting brief.

Petitioners respectfully submit that the decision of the Circuit Court of Appeals in this case is not only unsupported by the authorities but is contrary to the decisions of the courts in other circuits and of other courts in general. That it is so far a departure from the accepted and usual course of sound judicial proceedings as to deprive these petitioners of their substantial and valuable rights in securing remedies for wrongs committed against them. That if

the decision is allowed to stand as a rule of procedure governing such cases, it will prejudice the rights of all minority stockholders who desire, in the future, to secure redress for wrongs committed against them by their fiduciaries.

Respectfully submitted,

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